

Before the  
POSTAL REGULATORY COMMISSION  
WASHINGTON, DC 20268-0001

Rate Adjustment Due to Extraordinary or  
Exceptional Circumstances

Docket No. R2010-4R

PUBLIC REPRESENTATIVE COMMENTS ON REMAND CONCERNING THE  
EXIGENT REQUEST OF THE UNITED STATES POSTAL SERVICE

(July 25, 2011)

I. INTRODUCTION AND SUMMARY

A. Introduction

On July 6, 2010, the United States Postal Service (Postal Service) filed a request with the Postal Regulatory Commission (Commission) for authorization to increase rates for market dominant products which exceed the otherwise applicable limitations allowed by 39 U.S.C. § 3622(d)(1)(A) and 39 CFR § 3010.11 (an exigent price adjustment).<sup>1</sup> On September 30, 2010, the Commission issued Order No. 547 denying the Postal Service's Request.<sup>2</sup>

The Postal Service subsequently petitioned the United States Court of Appeals for the District of Columbia Circuit for review of Order No. 547. On May 24, 2011, the court issued its opinion in *United States Postal Service v. Postal Regulatory Commission*, 640 F.3d 1263 (D.C.Cir.2011) (denying in part and granting in part the Postal Service's petition). The court focused on (1) whether 39 U.S.C. § 3622(d)(1)(E)

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<sup>1</sup> Exigent Request of the United States Postal Service, July 6, 2010 (Request).

<sup>2</sup> Order Denying Request for Exigent Adjustments, September 30, 2010 (Order No. 547).

(the exigency provision) requires a causal relationship between an extraordinary or exceptional circumstance and an exigent rate request, and if so, (2) whether the statute dictates, or the Commission establishes, a standard for the necessary level of causation. On July 11, 2011, the Court remanded the case to the Commission for further consideration of the second issue, a standard for the necessary level of causation.

The Public Representative respectfully submits the following initial comments in response to a Commission request for comments addressing a causation standard applicable to exigent rate adjustment requests submitted under 39 U.S.C. § 3622(d)(1)(E).<sup>3</sup>

#### B. Summary of Comments

The Public Representative believes the Commission has wide latitude to develop an appropriate level of causation standard; in essence, a standard that relates the exigent circumstance to the level of financial recovery. In discussing the latitude available to the Commission, the court hints it might even be permissible to set a standard that allows a level of financial recovery greatly in excess of the effects of the underlying exigency.

At this time, it is the sole responsibility of the Commission to establish the appropriate standard. The court itself cannot establish a standard. The Commission must determine the standard using its expertise, as the court has concluded that a reading of the underlying statute is ambiguous on this matter. The only requirement is for the Commission to establish a standard which is based on a permissible

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<sup>3</sup> Notice and Order Establishing Procedures on Remand, July 11, 2011 (Order No. 757). In Docket No. R2010-4, the Public Representative submitted comments pursuant to Order No. 485 addressing (1) the sufficiency of the justification for an exigent rate increase, (2) the adequacy of the justification for increases in the amounts requested by the Postal Service, and (3) whether the specific rate adjustments are reasonable and equitable. Public Representative Comments in Response to the Exigent Request of the United States Postal Service, August 17, 2010. The instant comments should be considered in light of the comments in response to Order No. 485.

construction of the statute. Stated differently, a standard likely will be upheld upon review if it is consistent with the purpose (or Congress's perceived overall intended purpose) of the statute.

The Public Representative urges the Commission to establish a causation standard which allows for a level of financial recovery of no more than can be shown to be directly caused by the exigent circumstance. This causation standard appears consistent with the intent of Congress when enacting the exigent provisions of the Postal Accountability and Enhancement Act (PAEA).

## II. STATUTORY REQUIREMENTS AND STANDARD OF REVIEW

### A. Statutory Requirements

Title 39, section 3622, enables the development of modern rate regulation applicable to all Postal Service market dominant products. This section authorizes the Commission to establish “a modern system for regulating rates and classes for market-dominant products.” 39 U.S.C. § 3622(a).

The statutory requirement applicable to the Postal Service’s exigent Request, and the subject of the court’s review, establishes an exception to the normal price cap limitation appearing in 39 U.S.C. § 3622(d)(1)(A). It allows rate adjustments in excess of CPI-U under limited, atypical circumstances.

(E) notwithstanding any limitation set under subparagraphs (A) and (C), and provided there is not sufficient unused rate authority under paragraph (2)(C), establish procedures whereby rates may be adjusted on an expedited basis **due to** either extraordinary or exceptional circumstances, provided that the Commission determines, after notice and opportunity for a public hearing and comment, and within 90 days after any request by the Postal Service, that such adjustment is reasonable and equitable and necessary to enable the Postal Service, under best practices of honest, efficient, and economical management, to maintain and continue the development of postal services of the kind and quality adapted to the needs of the United States.

39 U.S.C. § 3622(d)(1)(E) [emphasis added].

### B. The Court’s Standard of Review

Congress authorized the Commission to establish “a modern system for regulating rates and classes for market-dominant products,” which includes provisions for exigent circumstances. See 39 U.S.C. § 3622. When a court reviews an agency’s construction of a statute which the agency administers, the court applies the standard of review found in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

*Chevron* developed a two-step process of statutory review. Step one is explained as follows:

First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.

*Chevron* at 842-3. Step two is explained as follows:

If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.

*Id.*

When considering the Postal Service's petition for review of Order No. 547, the court applied *Chevron* to examine the Commission's interpretation of 39 U.S.C. § 3622(d)(1)(E), the exigency requirement. Specifically, the court focused on two aspects of the Commission's interpretation of the included phrase "due to": (1) the requirement for a causal relationship between an extraordinary or exceptional circumstance and an exigent rate request, and (2) the establishment of a standard for the necessary level of causation.

### III. THE REQUIREMENT FOR A CAUSAL RELATIONSHIP BETWEEN AN EXIGENT REQUEST AND THE EXIGENT CIRCUMSTANCES

#### A. The Court Agrees with the Commission that the Statute Speaks to and Requires a Causal Relationship

The first question the court addresses is whether the term “due to” creates a causal relationship between situations (1) “whereby rates may be adjusted on an expedited basis” and (2) “either extraordinary or exceptional circumstances.” The court applies *Chevron*, step one, to determine whether Congress has directly spoken on the causation issue, and if Congress’s intent is clear, whether the Commission has given effect to this intent.

The court notes that the Commission’s analysis of 39 U.S.C. § 3622(d)(1)(E) looked to the plain meaning of the phrase “due to.” The court states that the plain meaning of “due to” is “because of.” 640 F.3d 1263 at 1267. Within this analysis, the court references the Commission’s examples of phrases synonymous with “due to” such as “by reason of,” “by cause of,” “by virtue of,” and “as a result of.” *Id.*; see also Order No. 547 at 54. The Commission stated that “[e]ach meaning and synonym expresses a causal relationship and leads the Commission to conclude that the Postal Service’s proposed adjustment must be causally related to the alleged extraordinary or exceptional circumstance.” Order No. 547 at 54.

The court agreed with the Commission that “the plain meaning of ‘due to’ mandates a causal relationship between the amount of a requested adjustment and the exigent circumstances’ impact on the Postal Service.” 640 F.3d 1263 at 1267. The court concluded that “under the plain meaning of the statutory language, a rate may be ‘adjusted on an expedited basis’ only *because of* ‘extraordinary or exceptional circumstances.’” *Id.* [emphasis in original]

B. Public Representative's Preferred Option for Resolution of this Docket

The Public Representative observes that the Commission, in Order No. 547, looks for a required causal relationship and determines "that while the Postal Service Request does identify an extraordinary or exceptional circumstance, it fails to demonstrate that the specific rate adjustments it proposes are **due to** those circumstances." Order No. 547 at 27 [emphasis in original]. Based on this finding, the Commission concluded "the proposed rate adjustments are not authorized by the PAEA, and the Postal Service Request is denied." *Id.*

The Public Representative also believes that the Postal Service has not demonstrated the exigent Request is "due to" or "causally related" to the cited extraordinary or exceptional circumstance. The Public Representative discussed, at length, the lack of record evidence explaining how the exigent Request addresses any specific aspect of the cited exigent circumstance.<sup>4</sup> See Public Representative Comments at 16-23. Nowhere does the Postal Service attempt to isolate a financial cost for the cited exigency from its liquidity crisis. The Public Representative continues to view this lack of evidence as indicative of the absence of a causal relationship between the extraordinary or exceptional circumstance and the exigent Request.<sup>5</sup>

The Public Representative believes that the Commission may use the finding of no causation to end consideration of the exigent Request at this point. If the Commission decides to end consideration of the exigent Request at this point, the Public Representative suggests the Commission take the following steps:

- Clearly state that the Postal Service has cited the recession and decline in mail volume as the exigent circumstance, and distinguish this from the Postal Service's liquidity crisis.

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<sup>4</sup> The Postal Service further fails to separate the effects of electronic diversion from the effects of the recession in explaining the decline in mail volume. See Public Representative Comments at 24-27.

<sup>5</sup> The Postal Service may file a new exigent request based upon the same exigent circumstance, and provide the necessary support for its position.

- Find that the Postal Service's Request was not filed to resolve the liquidity crisis nor would the liquidity crisis be found to meet the extraordinary or exceptional circumstance requirement.
- Reiterate its finding that the Postal Service has not demonstrated a causal relationship between the exigency and its exigent Request.
- With a finding of no causation, the issue of a standard for the necessary level of causation does not exist. Thus, find the level of causation issue not ripe for consideration in the instant docket.
- With a finding of no causation, again deny the Request.
- Finally, initiate a future rulemaking to consider a standard for the level of causation.

If the Commission, upon remand, changes its original finding of no causation, the Commission then will have to consider the causation issue. This path is fraught with legal peril.<sup>6</sup> The remaining comments address the determination of a standard for the level of causation. The Commission may address the causation issue in a rulemaking, or within this docket.

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<sup>6</sup> The Public Representative expresses concern over the possibility of legal challenge to creating a new legal standard, and applying that standard to the instant case. From the Postal Service's perspective, would it be allowed to review and comment on whatever standard the Commission develops before the standard is actually applied, and would it be allowed to provide additional testimony demonstrating how it would meet the new standard? From the participants' perspective, would they be allowed to review and comment on whatever standard the Commission develops before the standard is actually applied, and would they be allowed to review and comment on any new testimony that the Postal Service might provide?

#### IV. ESTABLISHMENT OF A STANDARD FOR THE NECESSARY LEVEL OF CAUSATION

##### A. Order No. 547 Opens up All of the Postal Service Financial Difficulties for the Court to Consider

Order No. 547 goes beyond the exigent Request and provides guidance to the Postal Service on the root causes of its liquidity crisis.<sup>7</sup> The Commission finds that the Postal Service's liquidity crisis stems from an overly optimistic Retiree Health Benefits Fund (RHBF) prefunding schedule.<sup>8</sup> See Order No. 547 at 68-80. The Commission's extensive discussion of the liquidity crisis may have prompted the court to proceed to the level of causation issue. This is logical if the court considered the cited exigent circumstance as a potential trigger for some, if not all, of the liquidity crisis.

##### B. The Court Finds the Statute Ambiguous as to the Necessary Level of Causation and Asks the Commission to Establish an Appropriate Standard

The court looks to the degree of causation necessary to grant a specific level of benefit. Although the court finds that the clear meaning of "due to" creates a causal relationship between an exigent circumstance and an exigent request, the court also finds that "due to" has no similar plain meaning regarding the closeness of the necessary causal connection. 640 F.3d 1263 at 1268. In this regard, the court finds the meaning of the statutory phrase "due to" ambiguous.

The court turns to *Kimber v. Thiokol Corp.*, 196 F.3d 1092 (interpreting Department of Labor regulations) for guidance on the meaning of "due to."

The phrase 'due to' is ambiguous. The words do not speak clearly and unambiguously for themselves. The causal nexus of 'due to' has been

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<sup>7</sup> For the purposes of the Postal Service's exigency request, the cited exigent circumstance of an unprecedented recession leading to a decline in mail volume is a distinct and separate issue from the Postal Service's liquidity crisis. Evidence has not been provided that the liquidity crisis qualifies as an extraordinary or exceptional circumstance, nor is granting the instant Request on this basis appropriate.

<sup>8</sup> The RHBF issue might have been addressed within the first year of enactment of the PAEA. Now, resolution of this issue should be addressed through legislative action, and not through the normal price adjustment mechanism or through an exigent request.

given a broad variety of meanings in the law ranging from sole and proximate cause at one end of the spectrum to contributing cause at the other.

*Thiokol Corp.* at 1100 (10<sup>th</sup> Cir. 1999)(quoting *Adams v. Director, OWCP*, 886 F.2d 818, 821 (6th Cir.1989)).

The court appears to believe that the Commission enunciated a standard for the level of causation, and infers that the Commission based this standard on what the Commission perceived as the clear meaning of the statutory phrase “due to.” The court states that the Commission applied a strict nexus or offset test, “requiring that the proposed adjustments mirror the amount of revenue the Postal Service can demonstrate was lost solely ‘due to’ the recession and its effects on mail volume, dollar-for-dollar.” 640 F.3d 1263 at 1267. The court quotes the Commission stating “the Commission seems to have required a very close match, expecting the Postal Service to ‘show that its proposed rate adjustments are tailored to offset the specific effects of the claimed exigency.’” *Id.* at 1267-8.

With a finding that the meaning of “due to” is ambiguous in this instance, the court rejects the Commission’s “interpretation of ‘due to’ as requiring that the Postal Service match the amount of the proposed adjustments *precisely* to the amount of revenue lost as a result of the exigent circumstances.” *Id.* at 1268 [emphasis in original]. The court contends the Commission erroneously based this interpretation on what the Commission believed was the clear meaning of “due to.” See *Chevron*, step 1.

The court concludes that the Commission should have proceeded “to Chevron, step 2, to fill the statutory gap by determining how closely the amount of the adjustments must match the amount of the revenue lost as a result of the exigent circumstances.” *Id.* An agency must fill in statutory gaps based on the agency’s expertise.

The court remanded the issue of properly interpreting “due to,” as applicable to a standard for the level of causation, back to the Commission. The court refers to *Peter*

*Pan Bus Lines, Inc. v. Fed. Motor Carrier Safety Admin.*, 471 F.3d 1350, 1354 (D.C.Cir.1006)(citing *PDK Laboratories, Inc. v. DEA*, 362 F.3d 786 (D.C.Cir.2004)) which explains that deference is not appropriate when an agency wrongly believes that its interpretation is compelled by Congress. It is not for the court to choose between competing meanings. Therefore, the court must remand the issue to the agency to interpret the statutory language anew.

The Public Representative notes that it is critical to understand the court is rejecting the *process* used by the Commission to arrive at a level of causation standard. The court is not specifically rejecting the merits of the standard that it believes has been established. Once the proper process is applied, the Commission may set whatever standard it finds appropriate (consistent with the requirements of *Chevron*, step 2).

#### C. Lessons from *Adams v. Director, OWCP*

The court's reference to *Adams v. Director, OWCP*, 886 F.2d 818 (6th Cir.1989) provides guidance to the Commission on establishing an appropriate standard for causation.<sup>9</sup> *Adams* reviews an agency's (Benefits Review Board) denial of benefits to a miner suffering from pneumoconiosis under the Black Lung Benefits Act. The only issue in *Adams* is whether a miner was totally disabled "due to" pneumoconiosis; specifically, the degree of necessary causation between the pneumoconiosis and the claim of total disability to allow for the provision of black lung benefits.

*Adams*, as with 640 F.3d 1263, struggles with the causation standard embodied in the term "due to." *Adams* states:

The words do not speak clearly and unambiguously for themselves. The causal nexus of "due to" has been given a broad variety of meanings in

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<sup>9</sup> The Public Representative notes that *Adams* undertakes statutory analysis to review a standard previously determined by an agency. In comparison, the Commission's decision is remanded because the Commission never initially established a standard based upon an applicable statute. This distinction is important because 640 F.3d 1263 does not, and cannot, suggest that the level of causation determined in *Adams* is applicable to the remand of the Commission decision. The Commission must determine the applicable standard on its own.

the law ranging from sole and proximate cause at one end of the spectrum to contributing cause at the other.

*Adams* at 821.

*Adams* concludes by interpreting the ambiguous “due to” language to mean a miner is eligible for benefits if the total disability is due “at least in part” to pneumoconiosis. *Adams* at 825.

The *Adams* statement that the court’s interpretation is “more consistent with the beneficial purposes of the [Black Lung Benefits] Act than is the Director’s proposed construction” is most enlightening. *Id.* The court further notes that its interpretation is consistent with prior regulatory and judicial treatment, and “supported by the principles underlying the Black Lung Act.” *Id.*

*Adams* refers to a string of cases which explain that the Black Lung Benefits “Act is remedial legislation that should be liberally construed so as to include the largest number of miners within its entitlement provisions.” *Id.* The court notes the “difficulties faced by miners with severely limited resources in proving causation, and the Act’s purpose as a remedy to cure an ‘oppressive burden of proof’ required under other benefits programs.” *Id.* The *Adams* court uses the above to conclude that a restrictive causation standard is inconsistent with the intent of Congress. *Id.*

The Public Representative believes that it is important for the Commission to follow the guidance provided in *Adams*. The salient point taken from *Adams* is for the Commission to determine a causation standard consistent with Congressional intent and supported by the underlying principles and purpose of the PAEA.

#### D. Potential Causation Standards

In summary, the Public Representative interprets *Adams* as stating that a specified disease (pneumoconiosis) need only be shown to be “at least in part” a contributing factor to a miner’s total disability in order for the miner to qualify for benefits. The court in 640 F.3d 1263 appears to pick up on this concept when stating:

“A financial crisis can often result from multiple contributing factors, of which only one may be ‘extraordinary or exceptional.’” 640 F.3d 1263 at 1268. The court in 640 F.3d 1263 appears to equate the Postal Service’s cited exigent circumstance, the recession and decline in mail volume, with a miner’s pneumoconiosis. It also appears to equate an *undefined* financial crisis with an arguably *well-defined* condition of total disability.

Note that *Adams* allows the recovery of permanent disability benefits far in excess of the damages caused solely by, or attributable to, pneumoconiosis. The court in 640 F.3d 1263 appears also to leave open the possibility that the Postal Service may recover in excess of what it can attribute to the cited exigent circumstance. An indication of this outcome is provided in the court’s statement that it has not decided “whether an increase might be so disproportionate to the exigency’s impact on the Postal Service that it could not be considered ‘due to’ that exigency.” 640 F.3d 1663, fn. 6.

The Public Representative applies *Adams* to the exigency legislation in an attempt to develop an appropriate standard for the level of causation. Two examples are provided to demonstrate problems with applying a relaxed causation standard, followed by a third example that appears consistent with the principles underlying the PAEA.

1. Example One: *Adams* taken to the extreme

Applying the same *Adams* “at least in part” standard to an exigent case could imply that if the Postal Service can demonstrate that the recession and decline in mail volume are at least in part a contributing factor to the Postal Service’s financial crisis (defined as the overall liquidity crisis), the Postal Service may be able to obtain benefits based up to the total amount of the liquidity crisis. This is far in excess of the cost of recovering from the recession and decline in mail volume.

The Public Representative does not support an “at least a contributing factor” standard for exigency requests. *Adams*, as a final check, examines whether the

outcome is consistent with the intent of the Black Lung Benefits Act. Looking to the PAEA, an “at least a contributing factor” standard does not appear consistent with the intent of Congress, and thus, likely would not withstand scrutiny by a reviewing court.

The factual differences and legislative purposes between *Adams* and exigent requests highlight the inapplicability of an “at least in part” standard to exigent requests. The intent of Black Lung Benefits Act is to freely provide benefits to a disadvantaged class. The legislation was remedial in that it addressed an “oppressive burden of proof” on a class exhibiting severely limited resources when seeking benefits. The PAEA established a price cap as the dominant method of addressing price adjustments. The intent of the exigent provisions is applicable only under limited extraordinary or exceptional circumstances. The Postal Service, as an institution, does not face an “oppressive burden of proof” nor is it faced with severely limited resources in proving causation, as in the case of individual miners.

This example, even though extreme, demonstrates the potential maximum limits of benefits allowable using the *Adams* standard.

## 2. Example Two: A more reasonable application of *Adams*

Applying the same “at least in part” standard to the exigent case also may imply that if the Postal Service can demonstrate that the recession is at least in part a contributing factor to the Postal Service’s loss in mail volume, the Postal Service may be able to obtain benefits based on a recovery from the total loss in mail volume.

The difference between example one and example two is definitional. The exigent circumstance is narrowed to only the recession. The total possibility of recovery is reduced from recovery from the liquidity crisis to only recovery from the decline in mail volume. For argument’s sake, the decline in mail volume is assumed to be caused by a combination of the recession and electronic diversion.

The outcome of the second example is more palatable than the first because there is a closer causal relationship between the exigency and the recovery amount,

even though the same standard is applied, and conceivably is more in line with the intent of Congress. However as discussed above with example one, the Public Representative believes that, even under this scenario, an “at least in part” standard is inapplicable to exigent requests.

### 3. Problems with Examples One and Two

Example one and example two share the same characteristic of applying a single “at least in part” standard to exigent requests with different definitions of the potential obtainable level of benefits. In example one, the broad definition of recovery from the liquidity crisis leads to a high level of benefit, whereas in example two, the narrower definition of recovery from the decline in mail volume leads to a lower level of benefits.<sup>10</sup> Both examples use the same causation standard but potentially could have very different outcomes. This situation does not exist in *Adams*. There, total disability, pneumoconiosis, and the level of potential benefits are essentially predefined. However, with exigent requests, the definitional issue makes an “at least in part” causation standard very problematic.

Example two also mentions two potential causes for the decline in mail volume: the recession and electronic diversion. The Postal Service certainly could have, but failed to, estimate the effects of the recession separate from the effects of electronic diversion in presenting its exigent Request. The Postal Service is not under the onerous or burdensome burdens of proof, or facing severely limited resources, similar to the miners in *Adams*. It should not be onerous or burdensome to require the Postal Service to estimate or quantify the effects of each potential cause of an exigent circumstance in any exigent request.

The Public Representative does not recommend adopting the standard discussed in the first two examples. The first example takes *Adams* to the extreme, and

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<sup>10</sup> What party would be allowed to define the potential level of benefits?

most likely is not consistent with the intent of Congress. The second example is arguably closer to what the Public Representative interprets as the intent of Congress, but its application is problematic. In both cases, application of the standard is totally dependent on the definition of the perceived financial problem on a case-by-case basis. Thus, an “at least in part” standard is not desirable.

#### 4. A Continuum of Potential Standards

There is a continuum of potential causation standards relating an exigent circumstance to the potential amount of recovery. The continuum of standards can run the gamut from minimal causation generating financial recovery significantly in excess of the exigent circumstance, to direct causation only allowing recovery for the specific exigent circumstance. It even has been suggested to the Public Representative that a causation standard requiring direct causation but only allowing partial recovery of a specific exigent circumstance may be appropriate.

The Public Representative does not support a causation standard that specifies only a partial recovery from a specific exigent circumstance. Exigent circumstances should be considered atypical to the normal business operation of the Postal Service and not recoverable by the normal CPI-U rate adjustment procedures. In this light, this would make an exigent request the primary method of recovering from the exigent circumstance. However, the Public Representative would not oppose an exigent request for less than full recovery from a specific exigent circumstance if the Postal Service’s request was for less and fully justified.

The Public Representative also does not support a causation standard that allows for recovery in excess of that attributable to a specific exigent circumstance. The two examples above demonstrate potential problems with applying a more forgiving causation standard. Further, Congress intended the CPI-U rate adjustment provisions to address normal business fluctuations that do not rise to the level of exigent circumstances. In addition to increasing rates, these provisions allow for the Postal

Service to bank “profits” when experiencing favorable economic conditions to be used when the Postal Service is operating under unfavorable economic conditions. Amounts in excess of those directly attributable to the exigent circumstance should be recovered through these provisions. To allow the Postal Service to recover in excess of what is directly caused by an exigent circumstance would mean that the Postal Service would be allowed to collect twice on the excess amounts: (1) once under the normal price adjustment provisions, and (2) again under the exigent provisions. This could not have been the intent of Congress.

5. Example Three: An appropriate standard consistent with *Adams*

The Public Representative urges the Commission to establish a causation standard which allows for a level of financial recovery of no more than can be shown to be directly caused by the exigent circumstance.<sup>11</sup> The Public Representative believes this represents the intent of Congress, and is the least problematic to apply.

The Public Representative finds invaluable guidance by comparing and contrasting other aspects of *Adams* to exigency requests. *Adams* appears to be a miner’s last chance, with few to no alternatives available. This is not the case with the Postal Service’s instant exigent Request. The Postal Service’s exigent Request outlines a multifaceted plan for recovery from its financial crisis. The exigent Request was but one step in this plan. The Postal Service has a plan of action to deal with most financial issues. This persuades the Public Representative to view exigent requests in terms of a last chance for the Postal Service that should be reserved for use only when other alternatives are limited or unavailable. Also, as explained above, the Postal Service has other avenues available to recover from events that do not rise to the level

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<sup>11</sup> This standard may sound more rigorous than it would be in practice. The Postal Service may not be able to estimate the true cost of any exigent circumstance with absolute precision. Thus, some form of best business practices standard of estimation should be established along with the causation standard. In comparison, the Public Representative believes that an only what can be precisely demonstrated standard, for estimating the amount of potential recovery, to be too strict.

of an exigent circumstance (CPI-U price adjustments and banking profits). Thus, a causation standard allowing recovery only from the effects of an exigent circumstance appears appropriate.

The Commission is free to pick any standard it finds appropriate, the only consideration being that the standard must be based on a permissible reading of the PAEA. Order No. 547 already provides background on the Commission's interpretation of Congress's intent. The Commission need only use this background and apply its expertise in establishing a standard. The Public Representative interprets the background material already developed by the Commission as supporting a standard requiring a close level of causation between an exigent circumstance and the amount of recovery.

## V. CONCLUSION

The Public Representative urges the Commission to repeat and expand upon its earlier finding that no causal relationship exists between the cited exigent circumstances and the exigent Request and bring this docket to a rapid conclusion. A separate rulemaking can be initiated to determine the level of necessary causation consistent with the direction provided by the court. A separate rulemaking will avoid many due process issues that will certainly arise if this issue is addressed in the instant docket.

*Adams* provides guidance in that the final standard should be developed consistent with the Congress's intent regarding the exigent provisions of the PAEA. Otherwise, *Adams* is distinguishable, including its conclusion on an applicable standard. The Postal Service does not face similar burdens, financial limitations, or infirmities faced by the miners addressed in *Adams*.

As to a level of causation standard applicable to the exigent requirements of the PAEA, the Public Representative believes Congress's intent requires a standard that applies a close level of causation. The Public Representative urges the Commission to establish a causation standard which allows for a level of financial recovery of no more than can be shown to be directly caused by the exigent circumstance.

The Public Representative respectfully submits the foregoing comments for the Commission's consideration.

Respectfully submitted,

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